165-180

165-180

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 621.

THOMAS W. JONES, PLAINTIFF IN ERROR,

vs.

ALFRED G. BRIM, ROAD SUPERVISOR OF DISTRICT No. 2, SUMMIT COUNTY, UTAH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED OCTOBER 8, 1896.

(16,400.)

not been in violation of any statute, and the extent of legislative prohibition in any way approaching the case is found in Section 1, Chapter 399 of the Naval Appropriation Act of June 10, 1896, which makes unlawful after June 30, 1897, the employment by a contractor of an officer of the Navy or Marine Corps (p. 361, Pamphlet Laws).

JOHN S. BLAIR,
CHARLES ABERT,
Attorneys for Appellee.

165-180

164-180

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 621.

THOMAS W. JONES, PLAINTIFF IN ERROR,

vs.

ALFRED G. BRIM, ROAD SUPERVISOR OF DISTRICT No. 2, SUMMIT COUNTY, UTAH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED OCTOBER 8, 1896.

(16,400.)

(16,400.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 621.

THOMAS W. JONES, PLAINTIFF IN ERROR,

vs.

ALFRED G. BRIM, ROAD SUPERVISOR OF DISTRICT No. 2, SUMMIT COUNTY, UTAH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Demurrer	2	2
Answer	3	2
Order overruling demurrer, &c.	4	3
Judgment	5	3
Assignment of errors	6	4
Notice of appeal	7	4
Undertaking on appeal	8	5
Clerk's certificate	10	5
Argument and submission	10½	6
Judgment	10½	6
Opinion	11	6
Dissenting opinion	14	8
Opinion on first appeal	26	15
Assignment of errors	31	18
Writ of error	32	19
Citation	33	20
Acceptance of service	33½	20
Bond	34	20
Clerk's certificate	35	21

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1896.

a In the Supreme Court of the State of Utah.

ALFRED G. BRIM, Road Supervisor, Respondent,
v.
THOMAS W. JONES, Appellant.

Filed April 25, 1896.

C. E. STANTON,
Clerk Third Judicial Dist. Court,
By LOOMIS, *Deputy.*

Filed April 25, 1896.

LILBURN P. PALMER,
Clerk Supreme Court, Utah.

1 In the Justice's Court, Echo Precinct, Summit County, Utah Territory, Before E. C. Morse, Justice.

ALFRED G. BRIM, Road Supervisor of Road District No. Two, Summit County, Territory of Utah, Plaintiff,
v.
THOMAS W. JONES, Defendant. } Complaint.

The plaintiff complains and alleges—

That by virtue of an appointment made by the county court of Summit county, in the month of April, A. D. 1893, plaintiff is now and was at all times hereinafter mentioned road supervisor of road district No. 2, in Summit county, Territory of Utah.

That on the eighth day of May, A. D. 1893, said defendant drove a band of sheep over a public highway, situated in Echo canyon, road district No. 2, Summit county, Utah Territory; that said highway is and was at last-mentioned date constructed on a hillside.

That on said eighth day of May, A. D. 1893, said sheep, in traveling said highway, damaged said public highway by destroying the banks of the same and by rolling rocks into and upon such highway.

That the damage done to said highway by reason of the
2 driving of said sheep over the same amounts to ten dollars.

That plaintiff therefore *parys* judgment for the sum of ten dollars and costs of suit.

DAVID B. TEWKSBURY,
Attorney for Plaintif-.

Endorsed: Filed June 14, 1893. Edw. C. Morse, justice of the peace. Filed July 29, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

Demurrer.

Title of Court and Cause.

The defendant demurs to the complaint of plaintiff, and for cause of demurrer alleges that the complaint does not state facts sufficient to constitute a cause of action.

RICHARDS & RICHARDS,
Attorneys for Defendant.

Endorsed: Filed Echo, June 21st, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

3 In the Justice's Court, Echo Precinct, Summit County, Utah, Before E. C. Morse, Justice.

ALFRED G. BRIM, Road Supervisor, District No. 2, Summit County, Utah Territory, Plaintiff,
v.
THOMAS W. JONES, Defendant. } Answer.

Now comes the above-named defendant and, not waiving his demurrer filed herein, answers the plaintiff's complaint and denies each and every allegation thereof.

RICHARDS & RICHARDS,
Attorneys for Defendant.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Thomas W. Jones, being first duly sworn, says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

his
THOMAS W. x JONES.
mark.

Subscribed and sworn to before me this 20th day of June, 1893.
J. T. RICHARDS,
Notary Public.

Endorsed: Filed June 21st, 1893. Edw. C. Morse, justice of peace. Filed Jul- 20, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

4 In the District Court for the Third Judicial District, State of Utah, County of Salt Lake.

ALFRED G. BRIM, Plaintiff,
v.
THOMAS W. JONES, Defendant.

Come now Messrs. Richards and Richards, attorneys for the defendant, and by leave of court first had and obtained withdraw

their answer heretofore filed in this action and submit the case upon the demurrer to the complaint.

Whereupon, the court having duly considered, it is ordered that the said demurrer be, and the same is hereby, overruled, and the defendant not desiring to answer and electing to stand upon the demurrer, and the plaintiff moving for judgment of dismissal, the court having duly considered, it is ordered, adjudged, and decreed that the plaintiff have and recover from and of the defendant judgment as prayed for in the plaintiff's complaint, together with costs of suit herein incurred and taxed at the sum of $64.45.

Dated January 15th, 1896.

5 In the District Court for the Third Judicial District of the State of Utah, County of Salt Lake.

ALFRED G. BRIM, Road Supervisor, Road District No. 2, Summit Co., Utah, Plaintiff,
v.
THOMAS W. JONES, Defendant.
} Judgment of the Court. No. 12123.

This cause came on regularly for trial on the 15th day of January, A. D. 1896, Waldemar Van Cott appearing as counsel for the plaintiff, and Richards & Richards for the defendant. A trial by jury having been expressly waived by counsel for the respective parties, the cause was tried before the court, sitting without a jury; whereupon, the answer herein having been withdrawn and the demurrer to the complaint having been overruled, and defendant electing to stand upon his demurrer, and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court delivers its findings and decision, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that said plaintiff have judgment against defendant in the sum of $10.00, together with interest thereon from date hereof until paid, at the rate of 8 % per annum, together with plaintiff's costs, herein expended and taxed at the sum of $64.45.

Judgment rendered January 15th, 1896.

Filed February 3, 1896.

C. E. STANTON, *Clerk*,
By GEO. D. LOOMIS, *Deputy*.

6 In the District Court for the Third Judicial District of the State of Utah, County of Salt Lake.

ALFRED G. BRIM, as Road Supervisor of Road District No. 2, Summit County, Utah Territory, Plaintiff,
v.
THOMAS W. JONES, Defendant.

Comes now the defendant in the above-entitled action and assigns and specifies the following errors, to wit:

1. The district court of the third judicial district erred in overruling the demurrer to plaintiff's complaint.
2. The said district court erred in deciding that plaintiff's complaint stated facts sufficient to constitute a cause of action.
3. The said district court erred in rendering judgment for the plaintiff.

RICHARDS & RICHARDS,
Attorneys for Defendant.

7 In the District Court of the Third Judicial District of the State of Utah, County of Salt Lake.

ALFRED G. BRIM, Road Supervisor of Road District No. 2, Summit County, Utah Territory, Plaintiff,
v.
THOMAS W. JONES, Defendant.
} Notice of Appeal.

To the said plaintiff and his attorneys, Messrs. Williams, Van Cott & Sutherland:

Take notice that the defendant in the above-entitled cause appeals to the supreme court of the State of Utah from the whole and every part of the judgment rendered and entered therein in the district court of the third judicial district of the Territory of Utah on the 15th day of January, 1896, in favor of said plaintiff and against the said defendant.

Dated April 14, 1896.

RICHARDS AND RICHARDS,
Attorneys for Defendant.

Service of this notice accepted April 14th, 1896.

WILLIAMS, VAN COTT AND SUTHERLAND,
Attorneys for Plaintiff.

Endorsed: No. 12123. Filed this 14th day of April, 1896. C. E. Stanton, clerk, by Geo. D. Loomis, deputy.

8 In the District Court of the Third Judicial District of the State of Utah, County of Salt Lake.

ALFRED G. BRIM, Road Supervisor, Road District No. 2, Summit County, Utah Territory, Plaintiff,
v.
THOMAS W. JONES, Defendant.

Whereas the defendant in the above-entitled action has appealed to the supreme court of the State of Utah from the whole and every part of the judgment given and made herein by the district court of the third judicial district of the Territory of Utah on the 15th day of January, 1896, in favor of the plaintiff and against the defendant: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of Salt Lake county, State of Utah, do, jointly and severally, undertake in the sum of three hundred dollars and promise on the part of said appellant that he will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof not exceeding the sum of three hundred dollars; to which amount we acknowledge ourselves, our heirs, executors, and administrators, jointly and severally, bound.

In witness whereof we have hereunto set our hands and seals this 18th day of April, 1896.

JOHN C. MACKAY. [SEAL.]
W. H. HAIGH. [SEAL.]

9 STATE OF UTAH, } ss:
County of Salt Lake, }

John C. Mackay and W. H. Haigh, being severally duly sworn, each for himself says that he is a resident of Salt Lake county, State of Utah, and a freeholder of said State, worth the sum of three hundred dollars over and above all of his debts and liabilities, exclusive of property exempt from execution.

JOHN C. MACKAY.
W. H. HAIGH.

Subscribed and sworn to before me this 18th day of April, 1896.

JOSEPH T. RICHARDS,
Notary Public.

Endorsed: No. 12123. Filed this 18th day of April, 1896. C. E. Stanton, clerk, by Geo. D. Loomis, deputy clerk.

10 STATE OF UTAH, } ss:
County of Salt Lake, }

I, C. E. Stanton, clerk of the third judicial district court of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint, demurrer, answer, order overruling demurrer, judgment by the court, specifications of error, notice of ap-

this court referred to and the rule applicable to this case, the appeal is dismissed with costs.

I concur.
ZANE, *C. J.*

Bartch, J., files dissenting opinion.

Endorsed: Title of court and cause. Opinion. Filed June 2, 1896. L. P. Palmer, clerk supreme court, Utah.

14 In the Supreme Court of the State of Utah.

ALFRED G. BRIM, Road Supervisor, Respondent,
v.
THOMAS W. JONES, Appellant.

Dissenting Opinion.

BARTCH, *J.:*

I cannot agree with the majority of the court in dismissing this appeal, nor do I agree with their application of rules of law to such circumstances as are shown by the record.

This action was originally brought in the third district court before the chief justice of the then Territory of Utah under section 2087, C. L. U. 1888, which provides that "Any person who drives a herd of horses, mules, asses, cattle, sheep, goats, or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway." The complaint charged that on a certain day the defendant drove a band of sheep over a public highway constructed upon a hillside in a certain locality, and that the sheep, traveling thereon, damaged the highway to the extent of ten dollars by the destroying of the
15 banks thereof and by rolling rocks into and upon such highway. There was no allegation or claim of negligence as to the driving of the sheep or use of the highway.

The defe*f*dant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, entered judgment in favor of the defendant, and dismissed the case. Thereupon the plaintiff appealed to the territorial supreme court. That court reversed the judgment and remanded the case for a new trial. Afterwards the cause was again brough- up in the district court, when, as appears in the abstract, "a trial by jury having been expressly waived by counsel for the respective parties, the cause was tried before the court sitting without a jury; whereupon, the answer having been withdrawn and the demurrer to the complaint having been overruled, and the defendant electing to stand on his demurrer, and the evidence being closed, the cause was submitted to the court for consideration and decision." Judgment was then entered against the defendant for a certain sum and for costs of suit, and the present appeal is from

this judgment. The majority of this court now hold that the decision of the territorial supreme court has become the law of the case and is conclusive, whether right or wrong, recognizing no exception to the rule of former adjudication or doctrine of *stare decisis*, however grave and peculiar the circumstances of a particular case may be, and that the doctrine applied in the case of Krantz *v.* Rio Grande Western Railway Co., 43 Pac. Rep., 622, that no appeal will lie to this court from a judgment entered by a district court in exact accordance with the mandate of the appellate court, upon a previous appeal, applies also to this case. I can assent to neither of these propositions, and, as I deem both of great importance in their application to causes in this State in the future, I feel impelled to state my reasons for dissenting. I do
16 not dispute the efficacy of the general maxim *stare decisis et non quieta movere*. When a point has been decided by an appellate court the decision is, with a few exceptions, conclusive in the same case, and in other cases it forms a precedent which should not ordinarily be departed from, and never on any slight grounds; but courts occasionally find it necessary to overrule decisions which have been made contrary to principle and the law of the land, as established by statute, judicial decision, and the Constitution. It must be admitted that it should require controlling considerations to induce a court to depart from a former decision to lay again the foundation of a law, and where there has been a series of decisions settling a question of law, and it has become a rule of property and business, and a change would seriously affect business interests, established and acquired under the existing law, the rule of *stare decisis* becomes impregnable and the law will not be changed unless by legislative enactment. Where, however, there has been but a single decision, which is manifestly erroneous, and important public or private rights are concerned, or where the questionable matter was not necessarily involved in the case, or where the points involved were decided contrary to the well-established legal principles which ought to have governed and injustice or hardship would result, or where it is clear that the law has been erroneously declared and no material property rights or business rules have been established thereunder, and a correction of the error will accomplish more good than harm, the court ought not refuse to reconsider its former action, even in the same case. Especially is this so where the court which announced the questionable principles and precedents is not a court of last resort. Such cases constitute well-recognized exceptions to the doctrine of *stare decisis*, and do not militate against its power and importance in the law; nor is that doctrine violated when it *it* is judicially declared that a decision, in opposition to
17 all previous jurisprudence and legislation, is subject to reconsideration and correction. Is it not an open violation thereof to declare that such a decision, however erroneous and unjust, however opposed to legislative enactment or constitutional provision, is nevertheless conclusive evidence of the law, and to announce a judicial heresy that any judicial decision is equivalent to positive law,

and that the courts make the law as well as define its application? The doctrine is founded on public policy, and is the only practical one respecting the weight and conclusiveness of judicial decisions. It is not an arbitrary rule of positive law which forbids any thought of questioning, under any circumstances, what has once been decided or any judicial discretion in relation thereto. It expresses our reverence for civil authority and our demands for obedience to such authority, and presents the injunction that courts shall not, for light reasons, abandon the principles announced under solemn judgment by their predecessors or themselves, nor without due consideration of public and private interests. This, however, does not prevent the use of judicial discretion in a proper case, where well-established rules of law have been judicially violated by a previous decision, even in the same case, and the doctrine does not demand that what is not law shall become the law of the case, especially where no serious consequences can result unjustly, but it rather induces the court to return to well-established principles.

In Calender's Adm. *v.* Keystone Mut. Life Ins. Co., 23 Pa. St., 471, where a previous decision was attacked on the ground that it was not supported by the cases on which it was based, Mr. Justice Lowrie, delivering the opinion and speaking of the duty of the court
18 to correct errors when practicable, said: "Do we violate the doctrine of *stare decisis* by now correcting the mistake and going back to the well-established doctrine which that case has disturbed? If we do, we commit a greater error than the one we have felt bound to correct, for that doctrine, though incapable of being expressed by any sharp and rigid definition, and therefore incapable of becoming an institute of positive law, is among the most important principles of good government."

In the case at bar the controversy arose over the section of the statute above quoted, which the appellant herein claims contravenes the fourteenth amendment to the Constitution of the United States, which provides: "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

An examination of the territorial law hereinbefore quoted, which is claimed to be in conflict with this provision of the Constitution of the United States, shows that the liability provided therein attaches only to a certain class of persons who use the highway, and as to such the law appears to be almost, if not absolutely, prohibitory, except upon payment of damages. A person "who drives a herd" of any of the animals therein mentioned over a highway constructed on a hillside is "liable for all damage done by such animals in destroying the banks." Under this provision there appears to be no escape from liability, because it is difficult to see how any herd of animals can be driven along any ordinary highway without doing some damage. The ordinary wear would cause some damage, and, however slight, the liability would be complete, and in case of suit costs would be the inevitable

result. Negligence in such a case is not an element, and
19 in the event of suit the defendant stands before the bar of justice condemned unheard. The same may be said of the liability for rolling stones into the highway or rolling them upon it by such animals. That liability would attach, however slight the damage, is apparent from the fact that in this case only ten dollars were claimed and recovered. Another singular provision is that to create the liability such animals must be driven by the defendant, so that if the same animals were carelessly and recklessly permitted to wander upon and damage the banks thereof or roll stones into or upon the highway no one would be responsible under the statute; nor is any one responsible in damages under the statute who drives a less number of animals than a herd, whatever that word may mean. Webster defines it: "A number of beasts assembled together;" and number: "A collection of many individuals." Nor is there any liability under the statute for injury done to the highway in any other manner. The law appears to be directed solely to certain persons, who represent some of the most important industries of the State, to the exclusion of all others. A person driving a team or any number of animals not amounting to a herd, no matter how much injury they may do to the banks of the highway, need not respond in damages. These provisions of the law are merely referred to here to show that there are strong grounds for the contention that the statute is in conflict with the provision of the Constitution above quoted, which says that no person shall be deprived of property "without due process of law," "nor denied the equal protection of the laws."

To determine the important — raised, the first appeal was taken to the supreme court of the then Territory of Utah, where by mere accident the constitutionality of the statute was upheld. The chief justice and three associate justices constituted the court.
20 The chief justice having tried the case below was disqualified from sitting at the hearing in the supreme court, where two of the justices held the law valid and reversed the case, the other justice dissenting. It will thus be seen that the full bench was equally divided as to the validity of the law, and that if it had so happened that the suit would have been brought before one of the justices who was in favor of its validity, then on appeal to the same court it would have been held unconstitutional. Such being the fact, it would seem that no iron rule ought to be applied to such a decision. The question involved is one that affects both public and private interests. Its nature is such that if this court could not concur in the result of the former appeal a change at this time could produce no serious injury, and would avoid injustice to those who are now within the terms of the statute; if, therefore, it should transpire upon reconsideration that the decision on the former appeal was so erroneous that it could not be recognized as authority in succeeding cases, then justice would require that a correction be made now before the sacrificing of individual rights, because of such error, and such correction would not, under the circumstances revealed, militate against the important rule of former adjudication.

It will be further noticed that the controversy in this case arose over a statute which is claimed by the appellant to be in conflict with the Constitution of the United States. If this contention be correct, then the supreme court of the Territory was not a court of last resort, the final determination of the question being reserved to the Supreme Court of the United States, and therefore the decision on the former appeal ought not to be regarded as the law of the case, if it is manifestly erroneous.

21 This court, in Jungk *v.* Reed, 42 Pac. Rep., 292, speaking through Mr. Chief Justice Merritt, said: "On principle it would seem that, admitting that the law was erroneously declared on a former appeal of an action and that such cause could be carried to the Supreme Court of the United States on appeal from the action of this court, there could be no reason of requiring that a party *to* go to that court in order to correct that error."

United States *v.* Elliott, 41 Pac. Rep., 720.

Lawrence *v.* Ballou, 37 Cal., 518.

Galigher *v.* Jones, 129 U. S., 193.

Notwithstanding the facts and circumstances indicated by the former recitals and which may be observed by an examination of the record and the history of this case, the majority of this court, in their opinion, say that "the respondent now claims that the questions of law decided in the same case on the former appeal in this court are conclusive on the court and parties and become the law of the case, whether rightfully or wrongfully decided," and sustain this contention without recognizing any exception to the general doctrine of the law of the case under any circumstances. If that court was not a court of last resort in that case, then the decision could not be regarded as *res adjudicata*. While the doctrine of *stare decisis* is one of the most important principles of the law and forbids that when controversies have been once submitted to a court of last resort to final arbitrament and the law and the facts deliberately determined by such court any subsequent appeal shall reopen a discussion of the law and the facts, and thus prolong litigation, when it is to the interest of the State that it shall cease, still it is not such an unbending rule as to recognize in such tribunal no infirmities of human judgment or any rights to exercise dis-

22 cretion when the peculiar circumstances of a case warrant it. That there are exceptions to the rule has been recognized by courts of eminent respectability.

In Bird *v.* Sellers, 122 Mo., 23, Mr. Justice Brace, delivering the opinion of the court, said: "It is manifest that the judgment in favor of the defendant on the first trial was correct and ought to have been affirmed, and that the judgment in favor of the plaintiff on the second trial is erroneous and ought to be reversed. Although the general rule is that what has once been passed upon here on appeal will in the same case upon a second appeal be treated as no longer open to dispute or further controversy, yet this is not an inexorable rule, without exceptions, but has been frequently departed from when such adjudication has been found to be wrong—not in

harmony with other decisions of the court—and no injustice or hardship would result from overruling the former decision."

So in Cluff *v.* Day, 141 N. Y., 580, the New York court of appeals said: "There is no iron rule which precludes a *a* court from correcting a manifest error in its former judgment, or which requires it to adhere to an unsound declaration of the law. It may for cogent reasons reverse or modify a former decision even in the same case, but the cases in which this will be done are exceptional, and the power should be sparingly exercised."

In Bomar *v.* Parker, 68 Texas, 435, it was said: "We have, then, to pass upon the same question which was before the court on the former appeal. This court has held that it *it it* not absolutely bound by its former adjudications, though rendered upon a previous appeal in the same case, but it is expressly decided that only in exceptional cases will a former ruling be departed from upon the same question when presented the second time in the same case."

23 So in Central Branch U. P. R. Co. *v.* Shoup, 28 Kan., 281, Mr. Justice Brewer, now of the Supreme Court of the United States, speaking of the rule in question, said: "We do not understand that the rule that a decision once made becomes the established law of the case is a cast-iron rule and incapable of relaxation in any event. Cases may arise in which it will be very clear that the first decision was erroneous; that not only in the case at bar will wrong result from adhering to the decision, but also other interests through the State will be imperilled; hence we do not doubt the power of the court to reconsider and reverse a prior decision in the same case."

On the question whether the doctrine of *stare decisis* applies to the decision of a supreme court which is not the court of last resort as to the case, it was said in Bridge *v.* Johnson, 5 Wend., 372, "The maxim *stare decisis et non quieta movere* cannot be applicable to such a case where the question never has in fact been decided by this court."

Wells on *Res Adjudicata* & *Stare Decisis*, sec. 613.
Van Fleet's Former Adjudication, sec. 664.
23 Am. & Eng. Ency. of Law, pp. 36, 37.
Frankland *v.* Cassaday, 62 Texas, 418.
Bane *v.* Wick, 6 Ohio St., 13.
Gwin *v.* Waggoner, 116 Mo., 143.
Jungk *v.* Reed, *supra.*
United States *v.* Elliott, *supra.*
Burns *v.* Ledbetter, 56 Texas, 282.
Rutledge *v.* Missouri Pac. R'y Co., 24 S. W. R., 1053.
Chambers' Adm'r *v.* Smith's Adm'r, 30 Mo., 156.
Hamilton *v.* Marks, 63 Mo., 167.
Steele *v.* Boley, 7 Utah, 64.
Barton *v.* Thompson, 56 Iowa, 571.
Moore *v.* Barclay, 23 Ala., 739, 748.
Bynum *v.* Apperson, 9 Heisk., 632.
Boone *v.* Shakleford, 66 Mo., 493.

Upon these considerations, and owing to the peculiar circumstances of this case, I am unable to concur in its dismissal on the ground that the opinion of the territorial supreme court must be regarded as *res adjudicata* or that it has become the law of the case.

Nor can I concur in the dismissal on the ground that there is no appeal from a judgment entered in accordance with the mandate of this court, because I do not understand that the judgment here appealed from was entered in accordance with the mandate of the court on the former appeal. That appeal was from a judgment, rendered in a district court, sustaining the defendant's demurrer and dismissing the complaint. The supreme court reversed that judgment and remanded the cause for a new trial without making any order as to the entry of any judgment. Afterwards the case again came before the district court for trial, and, after being heard by and submitted to the court, judgment was entered in favor of the plaintiff in the sum of ten dollars, with interest thereon, and costs in the sum of $64.45. From this judgment the present appeal was prosecuted.

It is clear that the judgment was not entered in accordance with any mandate, because it would be preposterous to say that an appellate court could make an order directing what judgment should be entered as the result of a new trial which it had ordered to be granted. If, then, this judgment was entered in the regular course of proceeding without any order of the appellate court as to what it should be, upon what principle of law can an appeal regularly taken therefrom under the rules and the statute be dismissed? The opinion of my brethren says: "In conformity with the previous rulings of this court referred to and the rule applicable to this case, the appeal is dismissed," and refer to the case of Krantz
25 *v.* Rio Grande Western R'y Co., 43 Pac. Rep., 622, which, however, is not all similar to this. The original appeal in that case was from an order granting a new trial and setting aside the judgment, and the supreme court reversed and remanded the case, setting aside the order granting the new trial and reinstating the original judgment. Such judgment was reinstated in exact accordance with the mandate. Thereupon the defendant appealed from the judgment so reinstated, and this court held that such appeal would be dismissed on motion of the appellee.

In the case at bar there was no mandate requiring any specific judgment to be entered, and therefore the doctrine of that case does not apply to this, because here the judgment appealed from was entered as the result of a new trial which was ordered by the appellate court and not as the result of specific directions from such court.

For the reasons thus stated I cannot consent in a dismissal of the appeal, and therefore dissent.

26 BRIM, Road Supervisor,
-v.
JONES.

(Supreme Court of Utah, March 16, 1895.)

Due Process of Law.

Comp. Laws Utah 1888, s. 2087, providing that any person who drives a herd of certain animals over a highway constructed on a hillside shall be liable for certain damage done by such animals to the highway, does not deny the equal protection of the law or deprive persons of property without due process of law, within the inhibition of Const. U. S. amedn. 14.

Appeal from district court, third district, before Justice S. A. Merritt.

Action by Alfred G. Brim, as road supervisor, against Thomas W. Jones. From a judgment for defendant plaintiff appeals. Reversed.

Williams, Van Cott & Sutherland for appellant; Richards & Richards for respondent.

SMITH, *J.*:

The sole question raised upon the appeal in this case is whether or not section 2087, Comp. Laws Utah 1888, is valid and constitutional. The section reads as follows: "Any person who drives a herd of horses, mules, asses, cattle, sheep, goats, or swine over a public highway where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway." The court below decided that this question was invalid and void, and the respondent claims that it is in violation of that portion of the fourteenth amendment of the Constitution of the United States which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is contended that this statute deprives the class of persons described in it of the equal
27 protection of the laws and deprives them of property without due process of law. An exhaustive argument is made in behalf of both the appellant and respondent in this case, and we have examined all the cases cited on either side. "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy which should seldom, if ever, be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void.

The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." This was the language of Marshall, C. J., in Fletcher *v.* Peck, 6 Cranch, 87. It is by this rule, then, that we must determine whether the statute in this case violates the Constitution. The claim on behalf of the respondent is that the act is class legislation and denies to drovers named in it that protection of the law which it extends to other citizens. We cannot agree with the respondent that this law is objectionable upon the ground stated. In the case of Allen *v.* Press Co. (Minn.), 41 N. W., 963, Justice Mitchell, of Minnesota, delivering the opinion of the court, says: "Laws public in their object may be confined to a particular class of persons if they be general in their application to the class to which they apply, provided the distinction is not arbitrary and rests upon some reason of public policy growing out of the conditions or business of such class." In Cooley Const. Lim. (5th ed.), p. 483, the author says: "If otherwise objectionable, all that can be required in these cases is that the laws be general in their application to the class or locality to which they apply, and they are then public in their character, and of their propriety and policy the legislature must judge." In the case of Barbier *v.* Connolly, 113 U. S., 32, 5 Sup. Ct., 357, the Supreme Court of the United States used the following language: "Class legislation, discriminating some and favoring others, is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, it is not within the amendment." In Gartside *v.* City of East St. Louis, 43 Ill., 47, the supreme court of Illinois, speaking of an ordinance requiring certain specified teamsters who were engaged in hauling stones and coal through the city to pay a certain license, say: "From the extent and character of his business these teams must have passed and repassed almost constantly. This, then, renders the repair of the streets more expensive and more necessary, from the fact that his vehicles seemed to be large and heavy. For the comfort and convenience of the citizens of the place, as well as persons not residing therein and traveling on its streets, it is necessary that they should be repaired and kept in good condition;" and the court upheld the ordinance for the reason stated. In the case of Railway Co. *v.* Beckwith, 129 U. S., 29, 9 Sup. Ct., 207, Mr. Justice Field, speaking for the Supreme Court, says: "The concluding clause of the first section of the fourteenth amendment simply requires that such legislation shall treat all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished." And again, on pages 30 and 31, 129 U. S., and page 207, 9 Sup. Ct., of the same opinion, the learned judge says: "The discriminations which are open to objection are those where persons engaged in the same business are subject to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

28

It is not pretended but that the statute under consideration affects

all drovers alike; that there is no discrimination made between persons engaged in the same line of business. The contention of respondent is that there is a discrimination made between those persons engaged in business as drovers and those engaged in other business which requires the use of the highway, as, for instance, teamsters and other travelers, in that the latter are not required to pay for any damage that they may do to highways situated on a hillside.

It is easy to conceive that the business of drover would be
29 exceedingly injurious to highways situated upon a hillside if their herds pass over the ground upon and near the highway in our mountain country, inasmuch as they would cause rocks and other obstructions to be thrown into the highways and would break down banks and otherwise specially injure the highways. It was no doubt for this reason that the legislature required that those persons so engaged should be specially liable for all damage that they did to the highways. Whether teamsters do like injury is not for us to determine. It is in the discretion of the legislature to regulate the use of highways, and if they make no distinction between different persons who use them in the same way we see no reason for complaint.

Counsel for respondent cites numerous authorities, and, among others, a decision of this court, to that point that statutes requiring railroad companies unconditionally to pay for stock killed by their trains are void and have been so held under the fourteenth amendment, above quoted. These cases are not in point. Railway companies are charged with a public duty to operate their trains, and are granted a public franchise for this purpose. They cannot escape the duty imposed upon them towards the public, to wit, the operation of their trains. If, then, while in the performance of this duty and without fault, they casually destroy stock straying upon their road, it is manifestly a deprivation of such companies of their property without due process of law to require them absolutely to pay for it, because in such case the duty of operating the train and the duty of paying for the stock killed are directly in conflict. There are loose expressions in some of the cases cited which would indicate that the courts made some other distinction. We think, upon the ground stated, these cases are consistent with the view we take of the statute under consideration. But there is no public requirement that drovers shall drive their herds over highways situated on hillsides. It is purely a matter of individual choice whether they do or do not. They have a right to do so, and if they do no injury they are liable to no one for anything. It is manifest, however, that the legislature considered that driving herds of stock of the character described over highways situated upon a hillside was
30 calculated to damage such highways. The maxim of the law is "*Sic utere tuo ut alienum non laedas*," the legal meaning of which is "So use your own property as not to injure the right of another." It is but an enforcement of this rule that is attempted by the statute in this case. The rule, as was stated by Lord Truro in Egerton *v.* Earl Brownlow, 4 H. L. Cas., 195, is applicable to the

public in at least as full force as to individuals. The public own the highways and must bear theexpense of keeping them in repair.

By this statute they simply say to the drover who is possessed of property which, if driven in a certain way, is calculated to destroy the highway that he must so use his own property as not to destroy that of the public. There is no absolute liability for using the public highway, but it is deemed probable that a use in a particular way, with particular property, will produce a peculiar injury, and, if such injury is produced, then the person producing it is held liable. We cannot see that this unjustly discriminates against such persons. On the contrary, it seems to be reasonable, fair, and judt legislation as between all of the citizens. It must be held, if a case be conceived that would justify the legislation, that that case existed when it passed, and it is certainly not difficult to conceive of the injury and wrong that it was intended to prevent by this statute. We are of the opinion that the statute is valid, and that the court below, in holding it invalid, was wrong. The judgment should be, and is therefore, reversed and the case remanded for a new trial.

King, J., concurs; Bartch, J., dissents.

31 Filed Oct. 3, 1896. Lilburn P. Palmer, clerk supreme court, Utah.

In the Supreme Court of the United States.

ALFRED G. BRIM, Road Supervisor of Road District No. Two, Summit County, Territory of Utah, Plaintiff,
v.
THOMAS W. JONES, Defendant.
} Assignment of Errors.

Now comes the above-named Thomas W. Jones, plaintiff in error and defendant, and, by his attorney, says that in the record and proceedings in the above-entitled action there is manifest error in this, that the supreme court of the State of Utah erred in dismissing said defendant's appeal from the judgement of the trial court:

1. Because the defendant was entitled to have the cause reviewed and reversed on said appeal.

2. Because the matters contained in the record and proceedings in said cause are not sufficient in law for the said Alfred G. Brim, road supervisor as aforesaid, to have or maintain his said action against the said Thomas W. Jones.

3. Because it appears that the judgement aforesaid was given for the said Alfred G. Brim, road supervisor, against the said Thomas W. Jones, when by the law of the land the said judgement ought to have been given for the said Thomas W. Jones and against the said Alfred G. Brim, road supervisor as aforesaid.

4. Because the trial court erred in overruling the defendant's demurrer to the plaintiff's complaint, and in holding that said complaint states facts sufficient to constitute a cause of action.

5. Because the said trial court also erred in holding that
31½ the alleged statute of the Territory of Utah, under which the plaintiff was permitted to recover in this action, is not in conflict with the fourteenth amendment of the Constitution of the United States, and that said statute is valid.

6. Because the plaintiff's complaint does not state facts sufficient to constitute a cause of action, and the said alleged statute of the Territory of Utah is contrary to the fourteenth amendment of the Constitution of the United States, and is therefore null and void.

Wherefore the said plaintiff in error prays that the judgement aforesaid be reversed, annulled, and held for nothing, and that he may be restored to all things he has lost by reason of said judgement.

F. S. RICHARDS,
Attorney for Thomas W. Jones, Plaintiff in Error.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Alfred G. Brim, road supervisor of district No. 2, Summit county, Utah, plaintiff, and Thomas W. Jones, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Thomas W. Jones, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Seal Circuit Court United States, District of Utah.

JERROLD R. LETCHER,
Clerk of the Circuit Court of the United States for the District of Utah.

Allowed by—
CHARLES S. ZANE,
Chief Justice Supreme Court, State of Utah.

Filed Oct. 3, 1896.

LILBURN P. PALMER,
Clerk Supreme Court, Utah.

33 UNITED STATES OF AMERICA, *ss:*

To Alfred G. Brim, road supervisor, district No. 2, Summit county, Utah, and Williams, Van Cott and Sutherland, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, wherein Thomas W. Jones is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of the State of Utah, this third day of October, in the year of our Lord one thousand eight hundred and ninety-six.

CHARLES S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

Filed Oct. 3, 1896.

LILBURN P. PALMER,
Clerk Supreme Court, Utah.

33½ [Endorsed:] Copy received Oct. 3, 1896. Williams, Van Cott & Sutherland, att'ys for defendant in error. Filed Oct. 3, 1896. Lilburn P. Palmer, clerk supreme court, Utah.

34 Know all men by these presents that we, Thomas W. Jones, of Salt Lake county, State of Utah, as principal, and John C. Mackay, William H. Haigh, and Henry Harker, all of Taylorsville, Salt Lake county, Utah, as sureties, are held and firmly bound unto Alfred G. Brim, road supervisor of district No. 2, Summit county, Utah, in the full and just sum of five hundred dollars, to

be paid to the said Alfred G. Brim, road supervisor as aforesaid, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a session of the supreme court of the State of Utah, in a suit pending in said court between Alfred G. Brim, road supervisor of district No. 2, Summit county, Utah, plaintiff, and Thomas W. Jones, defendant, a judgment was rendered against the said Thomas W. Jones, and the said Thomas W. Jones having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Alfred G. Brim, road supervisor as afor-said, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof:

Now, the consideration of the above obligation is such that if the said Thomas W. Jones shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS W. JONES, [SEAL.]
By RICHARDS AND RICHARDS,
His Attorneys.
JOHN C. MACKAY. [SEAL.]
WM. H. HAIGH. [SEAL.]
HENRY HARKER. [SEAL.]

Sealed and delivered in presence of—
CHARLES C. RICHARDS.

Approved by—
CHARLES S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

Marked: Filed Oct. 3, 1896. Lilburn P. Palmer, clerk supreme court, Utah.

35 UNITED STATES OF AMERICA, } ss:
State of Utah, }

I, Lilburn P. Palmer, clerk of the supreme court of Utah, in pursuance of a writ of error allowed in the case of Alfred G. Brim, defendant in error, *v.* Thomas W. Jones, plaintiff in error, lately pending in said court, do return attached hereto the writ of error issued in said cause and a transcript of the record and proceedings, opinions and bond, together with the original citation and assignment of errors, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached

transcript of said record and proceedings, opinions and bond, is a full, true, and complete copy of the several originals on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court, this third day of October, A. D. 1896.

Seal Supreme Court, State of Utah, Jan. 4, 1856.

LILBURN P. PALMER,
Clerk Supreme Court, Utah.

Endorsed on cover: Case No. 16,400. Utah supreme court. Term No., 621. Thomas W. Jones, plaintiff in error, *vs.* Alfred G. Brim, road supervisor of district No. 2, Summit county, Utah. Filed October 8th, 1896.

165-180

Clerk's Supreme Court, U. S.
FILED.
JAN 9 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court

165-180

OF THE

UNITED STATES.

OCTOBER TERM, 1896.

No. 621.

THOMAS W. JONES, PLAINTIFF IN ERROR.

vs.

ALFRED G. BRIM, AS ROAD SUPERVISOR OF DISTRICT NO. 2, SUMMIT COUNTY, UTAH.

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

FRANKLIN S. RICHARDS,
JOSEPH T. RICHARDS,
For Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 621.

THOMAS W. JONES, PLAINTIFF IN ERROR.

vs.

ALFRED G. BRIM, AS ROAD SUPERVISOR OF DISTRICT NO. 2, SUMMIT COUNTY, UTAH.

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

The defendant in error, as road supervisor, began an action before a Justice of the Peace of Summit County, Utah, to recover from plaintiff in error certain damage alleged to have been done by him in driving a flock of sheep over a public highway constructed on a hillside; the plaintiff in error both demurred and answered, and the defendant in error obtained judgment. The plaintiff in error appealed from the Justice's Court to the Third District Court of Utah Territory, and there his demurrer was sustained. The defendant in error declined to amend, and, a judgment of dismissal being entered, he appealed to the Supreme Court of Utah Territory, where the judgment of the lower Court was reversed and the case remanded to the said District Court for trial. Thereupon the plaintiff in error withdrew his answer, and elected to stand upon his demurrer, and upon the trial of said cause judgment was entered for the defendant in error for ten dollars and his costs, from which judgment an appeal was taken to the Supreme Court of the State of Utah, where the judgment of the lower Court was affirmed on the ground that the judgment of the Territorial Supreme Court established the law of the case.

The complaint does not state facts sufficient to constitute a cause of action, and does not support the judgment entered thereon. The only question involved in this case is the constitutionality of Section 2087 of the Compiled Laws of Utah, 1888, which reads as follows:

> Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway.

The plaintiff in error claims that this section is void because it contravenes the Fourteenth Amendment to the Constitution of the United States, which provides:

> No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

This provision of the Constitution applies to the Territories as well as to the States:

> The Constitution and laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere in the United States.
> U. S. Revised Statutes, Sec. 1891.

It was contended by the defendant in error that the matter came within the police power of the Territory, and that the law was therefore valid even though it would otherwise be inhibited by the 14th Amendment. We shall consider these two points together, believing them to be inseparable in this case, for, if the act under consideration is a legitimate exercise of the police power of the Territory, it is not inhibited by the Constitution, and if inhibited by the Constitution it cannot be a legitimate exercise of the general police power. The Constitution is a limitation upon that as well as other powers. As was said by the Supreme Court of New York, in the matter of Jacobs, 98 N. Y., 98, (50 Am. Rep., 648.)

> The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto. * * * Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive.
> People v. Budd, 117 N. Y. 1; (15 Am. St. Rep. 460.)

The Police Power is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the State necessary for the public welfare, and its boundaries are not susceptible of precise definition, and therefore the courts must, as each case is presented, determine whether it falls within or without the appropriate limits. In what manner can it fall without the appropriate limits, or exceed its

scope, except by the inhibition of the Constitution? That the inherent power in a State to regulate its affairs with respect to the health, morals and welfare of the community was a part of the common law of England, which existed prior to the adoption of the Constitution, and became a part of our jurisprudence, cannot be questioned. The constitution was intended to limit the exercise of this very power, in connection with others, and it will not do to say that the statute is within the general police power of the Territory, and therefore valid, even though it were inhibited by the Fourteenth Amendment, for that would be to say that the operation of the Constitution is restricted by the power which it limits. The rule that the police power is subject to constitutional restrictions is so well established that we do not deem it necessary to cite further authorities on that point. So the discussion of the subject resolves itself into the single inquiry: Is the Act inhibited by the Constitution? We think it is.

THE ACT IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES A CERTAIN CLASS OF PERSONS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES THEM THE EQUAL PROTECTION OF THE LAWS.

The Supreme Court of the United States, in the case of Hurtado v. California, 110 U. S., discusses some of the principles involved in this case, and, at page 558, say:

> It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be, not a special rule for a particular person or a particular case, but in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar, special, partial and arbitrary exertions of power under the forms of legislation, Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

Mr. Cooley, in his work on Constitutional Limitations, after quoting Mr. Webster's definition, says:

The words "by the law of the land," as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: "You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it."

Cooley's Con. Lim., page 433.

Miller on the Constitution, pages 661-665.

Note to Pearson v. Yewdall, Book 24, Lawyer's Co-op., Edition Supreme Court Reports, pages 436-7.

And note to Bank of the State v. Cooper, 24 Am. Dec. 537-545.

The act in question is void because it discriminates against persons who drive "herds of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside," and make such persons "liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway." These highways are public property, constructed with public money and dedicated to the use of the public. All persons have an equal right to travel upon them free from cost or liability of any kind. The provision that a certain class of persons shall be liable for damage done by them in using the highway, while all other persons are permitted to use it without liability for the damage they do, is unjust and illegal discrimination and a denial to that class of "the equal protection of the laws."

This act deprives the persons to whom it applies of their property "without due process of law," because it creates an absolute liability for the damage done by their animals, whether the persons are guilty of negligence or not. When a person drives animals over a public highway he becomes at once liable under this act for whatever damage may be done. There is no provision made for the appraisal or liquidation of the damage, nor for the ascertainment of it in any way. The road supervisor makes a demand for such amount as he deems proper. If the drover disagrees with him about the amount of damage done, suit is brought and it is already prejudged and determined by the law, that if any damage whatever has been done, the drover is liable therefor. His failure to concur in the infallible judgment of the road supervisor entails upon him the payment of the costs of suit. To impose such a liability without any negligence on the part of the drover is taking his property without due process of law.

It is unjust and illegal discrimination against this class of citizens to say that their liability shall not depend upon any negligent or wrongful act, while the liability of other persons injuring the highway shall depend upon their wilful or careless conduct. The correct principle seems to be recognized in Section 2084 of the same Act, where it is provided that "Any person who wilfully or carelesssly obstructs or injures any highway * * * is

guilty of a misdemeanor," and it is singular that it should be disregarded in the Section under discussion. In the cases of Jensen v. Union Pacific Ry. Co., and Shaw v. Utah Northern Ry. Co., 6 Utah, 253, the Supreme Court of Utah decided that the following act was unconstitutional:

> Any corporation operating a railway or railroad within this Territory, which shall injure or kill any live stock, by running any engine * * over or against any such live stock shall be liable to the owner or owners of such live stock for the damage sustained * * by reason of such injuring or killing.

The court say:

> It is conceded at the bar by the counsel for both sides that this statute creates an absolute liability upon the part of the defendant company, and that if it is a valid "law of the land" it furnishes ample authority for the action of the court below.
>
> Many definitions (of the term due process of law) have been attempted, but it is believed they all come to this citation, which means that a party shall have his day in court,—trial; which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defense upon the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not "due process of law." Any other procedure condemns before it hears, does not proceed upon inqury, but renders judgment before trial. Tested by the light of these suggestions, how stands it with the statute in this case? The defendant company, under a charter granted by the legislature, of which the statute mentioned is no part, has purchased its right of way over the lands of the Territory, established its track, and put thereon its engines and cars, for the purpose of carrying out the original design of the legislature in granting its charter. It will then be seen that the defendant is in the exercise of a lawful right, in a lawful way. Now comes the statute and says to the defendant: "Notwithstanding all this, when you kill an animal you shall pay its value to the owner." That is, although you are in the exercise of a perfectly lawful pursuit, and without any fault or negligence, proof of killing and value shall be conclusive evidence of wrong upon your part, and you shall not be allowed to aver or prove the contrary. If this be due process of law, then all the legislature has to do, to take the property of A. and give it to B., is to enact that when A. sues B. certain admitted facts shall establish conclusively A's right to recover, and B. shall not be heard to introduce evidence to the contrary. No matter how careful and cautious an engineer may be in the management of his train; no matter how steep the grade may be that this train is going down; no matter how many hundred lives are in his care behind his engine,—yet all must be sacrificed to save a horse or cow, or the company is to pay the damages. * * We are all of the opinion that the legislation in this case contested cannot be sustained. To do so is to take from the defendant company the right of way over its track, and confer it upon the cattle and horses of the country.

The Supreme Court of Idaho, in the case of Cottrell v. Union

In East Kingston v. Towle, 48 N. H. 57; (2 Am. Rep. 174,) the statute provided that any person suffering loss by reason of the maiming, killing or worrying of his sheep by dogs, may present proof of the nature and extent of his damages to the selectmen of the town, who shall draw an order for the amount in his favor upon the treasurer of the town, and thereupon the town may recover of the owner of the dog the full amount of such order. Held to be unconstitutional, in so far as it undertook to bind the owner of the dog by the decision of the selectmen fixing the amount of the damage without giving him an opportunity to be heard on the question. In this case the court say:

> It is an old maxim of the common law, that when an act of Parliament is against common right and reason, the common law will control it and adjudge it void; and one object of this provision in our Constitution was to adopt and confirm that maxim of the common law. An act of the legislature in order to have the force of a statute must, therefore, be neither repugnant to reason nor to the Constitution.
>
> It is a maxim of general jurisprudence, not confined to any code, but, so far as I am informed, recognized as fundamental in the law of every enlightened people, that no man's private rights shall be concluded by any judgment, decree or other adjudication to which he was not so far a party that he had opportunity to be heard, and to adduce evidence on all points that affected his interests.
>
> East Kingston v. Towle, 48 N. H. 57; 2 Am. Rep. 174.

In City of Janesville v. Carpenter, (Wis.) 46 N. W. 128, the statute provides that it "shall be unlawful and presumptively injurious to person and property to drive piles, * * in Rock river, within the limits of the county of Rock; and the doing of any such act shall be enjoined at the suit of any resident taxpayer, without proof that any injury has been or will be sustained by reason of such act;" and, further that it may be enjoined at the suit of anyone having the use of the water-power of the river in said county without other proof than that the act will cause the river to "rise or set back to some extent at the place, where the water used to operate his mill or factory is discharged into the river." Held that the act was void, as it deprived riparian owners of their property in the river without compensation, and without due process of law.

City of Janesville v. Carpenter, 46 N. W. 128.

In exparte Kuback, 85 Cal., 274, an ordinance of the City of Los Angeles making it a misdemeanor for a contractor to employ any person to work more than eight hours a day, or to employ Chinese labor, where the work is to be performed under any contract with the city, was held to be an attempt to prevent persons from employing others in a lawful business; that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others; and that it was not competent to forbid any person or class of persons from engaging in a lawful

business, or to subject others to penalties for employing them; also that such ordinance was not a valid exercise of the police power, it not appearing that the services to be performed were unlawful, or against public policy, or that the employment was such as might be unfit for certain persons, such as females or infants, or forbidden on that ground.

Ex parte Kuback, 85 Cal., 274.

A statute which makes the affidavit of the owner of stock killed or maimed on a railroad track conclusive evidence of the amount of damages sustained by the owner does not provide due process of law, and is therefore unconstitutional.

Savannah etc. Ry. Co. v. Geiger, 21 Fla. 669.

A statute which makes the treasurer's deed conclusive evidence of the regularity of all prior tax proceedings is void, because it deprives the owner of his property without due process of law, so far as respects the essential prerequisites for the exercise of the taxing power..

McCready v. Sexton, 29 Iowa, 356.

A statute which provides that the rates of charges for passenengers and freights recommended and published by a state railroad commission shall be final and conclusive evidence as to what are equal and reasonable, and that there can be no judicial inquiry as to the reasonableness of such rates, deprives a railway company of its property without due process of law.

Chicago, etc., Ry. Co. v. Minnesota, 134 United States 418.

Numerous instances where statutes have been held unconstitutional because they deprived persons of their rights without due process of law are given in note to Bardwell v. Collins, 20 Am. St. Rep. 556.

Note to State v. Ellet, 21 Am. St. Rep. 780.

The defendant in error seeks to escape from the irresistible logic of an unbroken line of decisions which hold this kind of legislation to be unconstitutional by claiming that the authority to make this enactment is inherent in the general police power of the Territory, notwithstanding it may be inhibited by the Constitution. This contention has been made a great many times before. Whenever, because of the development of the resources of the country, the advancement of its commercial interests, and the increase of population, new exigencies have arisen, which seemed to make it necessary to restrict the operations of private business in order to prevent monopolies, and the legislature has passed acts for that purpose, if the constitutionality of the legislation could not be sustained, upon any other theory, the claim has been made that it was within the police power of the State.

In the slaughter-house cases, 16 Wallace, 62, it was said that "the police power is, from its nature, incapable of any exact definition or limitation;" and in Stone v. Mississippi, 101 U. S. 818, that "it is easier to determine whether particular cases come within the general scope of the police power than to give an abstract definition of the power itself which will be in all respects accurate."

Slaughter-house cases, 16 Wall.
Stone v. Mississippi, 101 U. S. 818.
Smith v. Bivens, 56 Federal, 356.

All the cases agree in the proposition that every definition of the police power must be taken subject to the condition that the State cannot, in exercising it for any purpose whatever, encroach upon the powers of the general government, or upon the rights granted or secured to individuals by the supreme law of the land.

In the case of New Orleans Gas Light Company v. Louisana Gas and Heat Producing and Manufacturing Company, 115 U. S., 650, the court carefully considered and reviewed the previous decisions of that court relating to the police power of the States, which were declared to be all in harmony with each other, and to the effect that the police power only comprised such subjects as pertain to the public health, the public morals and the public safety, and that it is confined within the limits of these three subjects.

And as we have already shown (in Re Jacobs *supra*.) the police power, "however broad and extensive, is not above the Constitution, and when it speaks its voice must be heeded. It furnishes the supreme law, and so far as it furnishes restraints, the police power must be exercised in subordination thereto. Under the mere guise of police regulation, personal rights and private property cannot be arbitrarily invaded."

It is stated in the opinion of the lower court that this is not class legislation because the law is general in its application to the class to which it applies, and that it is general in its application because it applies equally to all persons driving cattle, sheep, etc., and that other persons passing over the highways would not be liable, no matter how much damage might result from their use of the highway. In support of this view the court intimates that the driving of cattle causes unusual damage. Though that may be true, it does not help the matter. The act cannot be sustained if it discriminates against a class, simply because there is a difference in the degree of damage done by members of that class and other persons; and if it could be sustained on that ground where is the line to be drawn and how can this system of taxation be made practicable? May not the passage of heavily laden vehicles, or persons on horseback, cause as much damage to the highway as driving a few animals over it? In the one case no matter how slight the damage, or how great the care exercised, the drover would be liable, while the drivers of teams or riders of horses would not. How can it be said that this is not an infringement of the constitutional rights of the drivers of stock, to

whose use the highway is dedicated in common with all other citizens, and is maintained, in part, by a tax upon the very property for whose damage it makes them liable in driving over the road. The policy of the government has been to maintain the roads by taxation upon property, and any law attempting to restrict the free use of such public highway is inhibited by the Constitution. We deny that this legislation affects all persons similarly situated within the meaning of the Supreme Court of the United States.

The case of Barbier v. Connelly, 113 U. S. 32, cited by the court, undoubtedly enunciates the general rule regarding class legislation, but we are unable to see how the rule applies to this case. The ordinance which that court sustained was, in every respect, general in its application, and it was also within the general police power of the state. It was an act to promote and protect the safety of the citizens of San Francisco, who were peculiarly endangered by their situation on the coast and by the almost universally dangerous character of their buildings, in case of fire, an evil which could be remedied in no other way.

This act is against public policy because it operates as a restriction upon the business in which the parties affected by it are engaged—one of the principal industries of the Territory. It tends to decrease the industries of the Territory, to retard the development of its resources and to diminish its wealth and prosperity.

But even though this act should be held not to be class legislation, the yet stronger objection remains that it deprives persons of property without due process of law. To impose an absolute liability depriving a person of the right to appear and be heard in a court of justice, and to offer evidence upon the question of his negligence or liability, is a violation of the constitutional inhibition.

There are a few cases in which the courts have held that the Legislature might regulate, to a certain extent, private business—notably, the elevator cases—but those were cases in which the public had an interest, and the courts only permit such restriction where an absolute necessity exists for the protection of the people from monopolies, and where the evil can be remedied in no other way. In no case has it been held, as is sought to be established here, that the Legislature may deprive the owner of his property without due process of law.

This statute affords opportunity for road supervisors to discriminate against drovers in favor of other persons using the highway, as well as among different persons engaged in the same particular occupation, as in every case where the supervisor can show that any number of animals has passed over a road such as is described in the statute some damage attaches, infinitesimally small though it may be, and the defendant is burdened not only with the loss of time and the restricted use of his property and means of livelihood, but must pay the costs of an action, employ counsel and be subjected to the tender mercies of a Justice of the Peace or a jury.

The former opinion of the Supreme Court of Utah was rendered by Judge Smith and concurred in by Justice King, Bartch, Justice, dissenting. The court announced that cases are not in

point which hold that statutes requiring railroad companies unconditionally to pay for stock killed by their trains are void, because in conflict with the 14th amendment, and says: "Railroad Companies are charged with a public duty of operating their trains and are granted a public franchise for this purpose; they cannot escape the duty imposed upon them, to-wit the operation of their trains. If then, while in the performance of their duty and without fault, they casually destroy stock straying upon their roads, it is manifestly a deprivation of such companies of their property without due process of law to require them absolutely to pay for it, because in such case the duty of operating the train and the duty of paying for the stock killed are directly in conflict. There are loose expressions in some of the cases cited which would indicate that the courts made some other distinction. We think, upon the ground stated, these cases are consistent with the view we take of the statute under consideration."

It is true that the foregoing is the reason assigned by many of the courts, and a forcible one it is, but we think its application to the case at bar is entirely erroneous. We are unable to see the distinction between prescribing a duty inconsistent with the absolute rights of an individual in the use of his liberty or property, and prescribing a duty antagonistic to a duty prescribed by law. We are of the opinion that in deciding those cases the courts had no idea of confining their decisions to the narrow construction of the Constitution adopted by Mr. Justice Smith, nor do they say, in effect, as Judge Smith said in this case, that a person may be deprived of the right to use his property in a lawful manner, without fault and with proper care for the rights of others, if there is no statute requiring him to use his property in the particular manner to which the restriction applies.

Would a statute providing for an unconditional liability on the part of all persons operating any kind of a vehicle on the streets of the city of Salt Lake for injuries to pedestrians, whether the former were exercising due care or the pedestrians were guilty of contributory negligence, be any less unconstitutional than a statute with the same provision in regard to the operating of a street railway within the same limits, because in the one instance the duty was antagonistic to a right to the lawful use of property which might be the means of obtaining a livelihood and in the other in contravention of a specific duty imposed by law? We think not. It does seem to us that the statute creates an absolute liability for the use of the highway, though enforcible perhaps in the discretion of the road supervisor.

It will be observed that in the case of Gartside v. City of East St. Louis, 43 Ill. 49, from which the court quotes, the question of class legislation was not raised, and the court did not decide that question, as intimated in the opinion of Mr. Justice Smith. That was a case of license where the ordinance provided for the payment of a license fee on all vehicles operated for the carriage of persons or property for hire and in that case the court held the schedule rate applied to a certain class of vehicles to be reasonable.

The logical deduction from the above premises is aptly stated in 3 American & English Encyclopedia of Law, 714, as follows:

> The first matter of inquiry is the meaning of the term "due process of law." If it has no broader meaning than process prescribed by act of Legislature, it is the end of the case. But such a construction would render the constitutional guaranty mere nonsense; for it would then mean, no state shall deprive a person of life, liberty or property unless the state shall choose to do so.

We desire to call attention to the dissenting opinion of Mr. Justice Bartch (Transcript pages 8 to 14), in which, as appears to us, he shows clearly that the territorial court erred in its original decision, as did also the State Court in its application of that decision as the law of the case. While the entire opinion should be read, by the court we only quote the following:

> In the case at bar the controversy arose over the section of the statute above quoted, which the appellant herein claims contravenes the fourteenth amendment to the Constitution of the United States, which provides: "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
>
> An examination of the territorial law hereinbefore quoted, which is claimed to be in conflict with this provision of the Constitution of the United States, shows that the liability provided therein attaches only to a certain class of persons who use the highway, and as to such the law appears to be almost, if not absolutely, prohibitory, except upon payment of damages. A person "who drives a herd" of any of the animals therein mentioned over a highway constructed on a hillside is "liable for all damage done by such animals in destroying the banks." Under this provision there appears to be no escape from liability, because it is difficult to see how any herd of animals can be driven along any ordinary highway without doing some damage. The ordinary wear would cause some damage, and, however slight, the liability would be complete, and in case of suit costs would be the inevitable result. Negligence in such a case is not an element, and in the event of suit the defendant stands before the bar of justice condemned unheard. The same may be said of the liability for rolling stones into the highway or rolling them upon it by such animals. That liability would attach, however slight the damage, is apparent from the fact that in this case only ten dollars were claimed and recovered. Another singular provision is that to create the liability such animals must be driven by the defendant, so that if the same animals were carelessly and recklessly permitted to wander upon and damage the banks thereof or roll stones into or upon the highway no one would be responsible under the statute; nor is any one responsible in damages under the statute who drives a less number of animals than a herd, whatever that word may mean. Webster defines it: "A number of beasts assembled together;" and number: "A collection of many individuals." Nor is there any liability under the statute for in-

jury done to the highway in any other manner. The law appears to be directed solely to certain persons, who represent some of the most important industries of the State, to the exclusion of all others. A person driving a team or any number of animals not amounting to a herd, no matter how much injury they may do to the banks of the highway, need not respond in damages. * * *

To determine the important question raised, the first appeal was taken to the Supreme Court of the Territory of Utah, where by mere accident the constitutionality of the statute was upheld. The chief justice and three associate justices constituted the court. The chief justice having tried the case below was disqualified from sitting at the hearing in the Supreme Court, where two of the justices held the law valid and reversed the case, the other justice dissenting. It will thus be seen that the full bench was equally divided as to the validity of the law, and that if it had so happened that the suit would have been brought before one of the justices who was in favor of its validity, then on appeal to the same court it would have been held unconstitutional.

We respectfully submit that the statute is unconstitutional and void. It deprives persons of their property without due process of law and denies to them the equal protection of the laws. The judgment of the Lower Court should be reversed.

FRANKLIN S. RICHARDS,
JOSEPH T. RICHARDS,
For Plaintiff in Error.

165-180

165-180

Office Supreme Court, U. S.
FILED.
JAN 9 1897
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 621. (16,400.)

THOMAS W. JONES, Appellant,

vs.

ALFRED G. BRIM, as Road Supervisor of Road District No. 2, of Summit County, Utah, Appellee.

BRIEF OF APPELLEE.

PARLEY L. WILLIAMS,
Attorney for Appellee.

Star Printing Co., 143 S. West Temple.

jury done to the highway in any other manner. The law appears to be directed solely to certain persons, who represent some of the most important industries of the State, to the exclusion of all others. A person driving a team or any number of animals not amounting to a herd, no matter how much injury they may do to the banks of the highway, need not respond in damages. * * *

To determine the important question raised, the first appeal was taken to the Supreme Court of the Territory of Utah, where by mere accident the constitutionality of the statute was upheld. The chief justice and three associate justices constituted the court. The chief justice having tried the case below was disqualified from sitting at the hearing in the Supreme Court, where two of the justices held the law valid and reversed the case, the other justice dissenting. It will thus be seen that the full bench was equally divided as to the validity of the law, and that if it had so happened that the suit would have been brought before one of the justices who was in favor of its validity, then on appeal to the same court it would have been held unconstitutional.

We respectfully submit that the statute is unconstitutional and void. It deprives persons of their property without due process of law and denies to them the equal protection of the laws. The judgment of the Lower Court should be reversed.

FRANKLIN S. RICHARDS,
JOSEPH T. RICHARDS,
For Plaintiff in Error.

165-180

165-180

Office Supreme Court, U. S.
FILED.
JAN 9 1897
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 621. (16,400.)

THOMAS W. JONES, Appellant,

vs.

ALFRED G. BRIM, as Road Supervisor of Road District No. 2, of Summit County, Utah, Appellee.

BRIEF OF APPELLEE.

PARLEY L. WILLIAMS,
Attorney for Appellee.

Star Printing Co., 143 S. West Temple.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 621. (16,400.)

THOMAS W. JONES, Appellant,

vs.

ALFRED G. BRIM, as Road Supervisor of Road District No. 2, of Summit County, Utah, Appellee.

BRIEF AND ARGUMENT.

Appellant contends that Sec. 2087, 1 Com. Laws of Utah 1888, page 743, is unconstitutional, as being opposed to Sec. 1 of the Fourteenth Amendment.

Section 2087 is as follows:

> "Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway."

It is important for the Court to remember that Utah is a mountainous country; that the series of valleys inhabited by the people are reached through canyons; that many miles of our highways must necessarily be, and are, constructed on hillsides; that herds of sheep, horses, cattle,

etc., are driven into the mountains in the warmer weather, and into the valleys in winter; that it is a matter of great concern to the people that highways constructed on hillsides should be safe and so maintained at a minimum expense.

POINT I.

The section in question is not inhibited by Section 1 of the Fourteenth Amendment, to-wit: * * nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The principle is well established that Section 2087 is not special or class legislation.

In Allen vs. Pioneer Press Co., 12 Am. St. Rep. 707, an action of libel was brought against the company and one of the questions involved was the validity of an act giving certain rights and immunities to publishers of newspapers which were not given to other defendants in libel suits. On page 709-10, Justice Mitchell said:

> "Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy growing out of the condition or business of such class."

The section quoted is public in its objects as it relates to any person who drives any of the herds of animals mentioned. The distinction between drivers of such herds and other persons rests upon valid reasons of public policy growing not only out of the condition but business of such drivers and herds. The legislature undoubtedly passed this section because it is difficult and expensive to construct

public highways along a hillside, and it is public policy to maintain them in a safe condition, which is a difficult matter. Such maintenance is demanded by the public for its safety and it is an universal object to the commonwealth to do this at a reasonable expense. The legislature had also in mind that the herds mentioned on such highways do a great and unusual damage. They are not held in the traveled road and so cave off the banks and roll large and unusual quantities of rocks into the highways, making them practically impassable. Thus the highways are made dangerous to the general traveling public and also a great expense is incurred to remove such rocks and make the highways passable. When it is remembered that many miles of the public highways in Utah are so constructed and also the large number of herds constantly driven over such roads, and also the large appropriations by our Legislature and County Courts to keep such highways in repair, the public policy of the Legislature is apparent in compelling the drivers of such herds to liquidate the damage done on such highways.

It must be noticed that this section does not impose a liability for traveling in the road, but only for "destroying the banks, or rolling rocks into or upon such highway." To destroy the banks or roll rocks into the highway, such herds must travel outside the road, and the damage results, not from *using* the road but from *not using* it.

Neither is the liability imposed for a damage done by one or two "horses, mules, asses, cattle, sheep, goats or swine," either in "destroying the banks or rolling rocks into or upon such highway;" it is only when such animals equal a *herd* that the statute imposes the liability.

It is not a trivial damage the Legislature seeks to recover, but the large and substantial damage done by herds

to portions of the highway particularly constructed, and peculiarly subject to large and unusual damage; the liability is not imposed for damage done to *all* highways, but only to those constructed on hillsides: these particular highways are peculiarly susceptible to damage as the banks above and below are more easily caved off; rocks also are more easily rolled down hill by many animals moving than would be the case on flat or comparatively flat highways.

No other herds, no other persons, damage the highway like the ones mentioned; nor are any other parts of the highway damaged by such persons and herds to the extent of the ones mentioned.

Under the law no liability is imposed for such herds rolling anything into the highway except "rocks;" it can easily be imagined why this liability is imposed—a herd of sheep, for instance, on a hillside, will roll rocks to a considerable distance into the highway; a single sheep or horse, etc., will not; therefore a liability is imposed not on a single animal but on a herd; not for rolling *dirt* into the highway, but *rocks*.

If these herds traveled in the roads, the banks would not be caved off, nor rocks rolled into the traveled parts; but the damage is occasioned by the animals traveling outside the beaten roadway. It is these herds and no others that do the particular damage mentioned in the law; it is the persons who control such herds, whoever they may be, or however many they be, that are pointed out by the law.

It is evident that there is but one place to travel for vehicles on a highway constructed on a hillside; the Legislature may, if it sees fit, impose a toll to pass over such highway and may graduate the toll to suit the probable damage. A man might go free if the Legislature saw fit, and a charge might be made only as to vehicles and animals. The poll tax is a charge for highways, though some

persons use them practically not at all. Hence no one has a legal right to pass on a highway free of cost if the Legislature otherwise determines. When herds travel outside of highways constructed on hillsides and break down banks and roll rocks into the highways, a damage is unquestionably done; it is immaterial whether or not it is negligently done, as the damage results from not using such highway properly; but in any event it is a legislative function to determine who and what shall pay damage. Liability as an abstract principle does not depend on negligence; at common law, a husband was liable for his wife's debts; an idiot is liable civilly for destroying another's property; a railway company is liable absolutely for damage done when required to fence and omits to do so; property may be destroyed to check a fire without compensation; a railway company is liable absolutely for damage done by fire; an owner is liable for damage done by the escape of a wild animal; and many other instances of a similar character might be mentioned.

Cooley's Const. Lim. (5th Ed.) page 481-3, confirms the general doctrine stated and in particular it is stated on page 483:

> "If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in their character, and of their propriety and policy the legislature must judge."

It is said by this court in 113 U. S. 32, Barbier v. Connolly:

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The Supreme Court of South Carolina in sustaining the constitutionality of a statute attacked as class legislation in making railway companies absolutely liable for all damages done by fires irrespective of negligence said:

> "It is upon those common carriers who have been confided valuable franchises by the state on condition of a use of them by the public, and who operate railroads over a right of way contiguous to the property of others, with a flying locomotive whose sparks sometimes spread ruin to others; it is to the railroads who alone do this, that the law speaks, whether such roads are operated and owned by one man, a partnership of men or a chartered company; it speaks to everyone alike; it is no respecter of persons."

18 L. R. A. 445, McCandless v. Rich &c. R. Co.

See also

3 L. R. A. 350, U. P. Ry. Co. v. Debusk.

So drivers of the herds designated, are, under our statute made responsible for the damage they do and no more. This damage is large and exceptional and is done by no other persons and no other herds, as no others are similarly situated.

In the following cases, after a thorough review of the authorities, statutes were held not objectional as class legislation.

In Alabama, where the statute only punished bankers who discounted notes in excess of a certain rate.

12 So. Rep. 579, Youngblood vs. Bir. &c. Co.

In Texas where railroad companies only were compelled to pay an attorney's fee not to exceed $10 to plaintiff when a recovery was had for stock killed.

31 S. W. Rep. 933, Gulf &c. Rwy. Co. v. Ellis.

In Washington where a statute compelled attorneys to defend indigent persons without compensation.

31 Pac. Rep. 876, Presby v. Klickitat Co.

In Oregon where a statute exempted only officers and seamen of sea-going vessels from arrest or imprisonment for debt.

28 Pac. Rep. 130, in re Oberg.

In Illinois where the statute permitted only cases that could be tried in an hour or less to be put upon a "Short Cause Calendar" for trial.

133 Ill. 175, Jensen et al. vs. Fricke et al.

See also

109 Ill., 311-12, Hawthorn et al. vs. People.

So in Louisina an ordinance requiring all wells to be filled up on premises where bread was made for public consumption, it being held that the ordinance applied to all persons engaged in the same business and similarly situated.

10 L. R. A., 135, State of La. vs. Schlemer.

See also

113 U. S., 32, Barbier vs. Connolly.

113 U. S., 708-9, Soon Hing vs. Crowley.

127 U. S., 305, Mo. Pac. Ry. Co. vs. Mackey.

76 Cal. 442 et seq., People vs. Henshaw.

In 43 Ill. 47, Gartside vs. The City, etc., it was claimed an ordinance was invalid which required a license to be taken out by persons hauling stone coal through the city.

On page 50, Chief Justice Walker said:

> "And from the extent and character of his business, these teams must have passed and repassed almost constantly. This, then, renders the repair of the streets more expensive and more necessary from the fact that his vehicles seem to be large and heavy. For the comfort and convenience of the citizens of the place, as well as person not residing therein but travelling on its streets, it is necessary that they should be repaired and kept in good condition."

And on page 51 said:

> "In this case appellant, like the owner of a team passing over a toll bridge or ferry, must submit to a reasonable exaction. So, of a turnpike, or a plank road. In this case as in those, the corporation is required to keep the streets in repair, and it is but reasonable and just that persons using them shall contribute to a reasonable extent to the expense of and outlay for the purpose."

If a license can be collected in advance in such cases then on principal the damage done by such person could be collected afterwards; and if the damage done by heavy coal wagons can be collected as an exceptional damage, then the damage done by drivers of such herds on public highways constructed on a hillside can also be collected.

From times of antiquity toll roads have been operated and tolls collected and graduated according to the animals, vehicles and persons passing; it was the object to make such tolls approximately correspond to the damage done. So in all civilized countries toll roads have been maintained, the charge varying as above, and no legal objection can be made to such proceedings. Yet in principle what is the difference between such tolls and a statute requiring the damages actually done to be paid? In the former the damage is estimated in advance and collected and may be less or more than the actual damage; in the latter the damage actually done is collected and no more; of the two methods the latter is the more equitable. And such drivers can escape any liability by repairing any damage that may be done to the banks and the highways by the herds they drive, this is demonstrable, because, if the damage designated by the statute is repaired leaving the highway in as good condition as before, there is no damage to recover and such fact could be successfully pleaded.

The legislatures and cities have nearly always made

graduated charges on footmen, men on horseback, cattle, sheep and hogs, buggies, wagons, and loaded wagons, and that there ought to be a difference in charges has always been recognized and approved. There has been so many grants to toll bridges and turnpike companies that the power cannot be doubted.

When toll roads or plank roads are established or turnpike companies chartered, or toll bridges licensed it is but another way of maintaining such highways and collecting the damage done.

From time immemorial it has been and now is customary to collect licenses over and above exactions from other persons from "cart men, hack, cab, omnibus, stage and truck owners and drivers, and carriages and vehicles used for the transportation of passengers or merchandise." These licenses are exacted because these classes make more use of or do greater damage to the roads than other classes and hence the exactions are in proportion. It goes without saying that if the legislature can authorize cities to make such exactions, then it can do so itself, and in case of cities such legislation is established beyond dispute.

See generally:

28 A. D. 623, State v. Neil.

94 U. S. 113, Munn v. Illinois.

Elliot on Roads and Streets, pp. 58-9, 66-7-8, et seq.

In 129 U. S. 26, Minn. etc. Ry. v. Beckwith, it was contended by appellant that the statute of Iowa imposing double damages for killing stock against railway corporations in case of failure to fence was unconstitutional as opposed to the above clauses of the 14th Amendment. But in overruling the alledged conflict with the 14th Amendment, Mr. Justice Field, on page 29 said:

"The concluding clause of the first section of the Fourteenth

> Amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. Such has been the ruling of this court in numerous instances where that clause has been invoked against legislation supposed to be in conflict with it."

And again on pages 30-1, said:

> "The discriminations, which are open to objection" the court added, "are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

The legislature in the first instance decides whether railway companies shonld bear special burdens by reason of the business they carry on, and the courts have upheld such legislation; so the legislature decides whether certain animals driven over certain portions of the public highways endanger life, incur expense or destroy property; and if yes, then special burdens may be imposed on such class. The above cases in principle are analogous and were so treated by the above court, for it is said, on page 29:

> "The state can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity, and to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease and danger, in the varied forms in which they may come."

Counsel for appellant assert at page 4 of their brief that

> "All persons have an equal right to travel upon them [highways] free from cost or liability of any kind."

This is not correct; in case of toll roads, charges are graduated to cover the approximate damage done to the

highways, and one charge is made for one person and another charge for another. In cities different charges are made for hacks, drays, heavily loaded wagons, carriages and so on. All this goes to show that the State may graduate its charges according to the approximate damage done to highways. It is not true as appellant contends that one class of persons is discriminated against in favor of another. It is true that certain class of persons who drive certain herds are required to pay a certain damage, but this damage is done by traveling outside of the road which is an unusal mode of injuring the highway. If these herds were confined in the traveled parts, there would be no banks caved off above or below and no rocks rolled into the highway, and consequently no liability under the statute.

Counsel for appellant further assert that a person who drives any of these animals over a public highway at once becomes liable for damages. This is not correct. It is only when herds are driven over these highways and not confined within the traveled parts that the liability is imposed and then only in case the banks above or below are caved off or rocks are rolled down the incline into the traveled part. The case is the same as though a man should go up the hillside and purposely roll rocks down into the highway. The law could make such a man liable for such damage and it can also make the owners of herds that accomplish the same result liable in the same way. Suppose the law should provide that, over highways constructed on hillsides animals should be confined in the traveled parts and should not be allowed to stray outside the highway. Would not such a statute be clearly valid? It seems to us without question it would. If so, then it follows necessarily that if animals are allowed to deviate from the traveled parts and do damage, the liability imposed is valid. Counsel for ap-

pellant assert in effect that such traveling is not negligent or wrongful, but it is easily seen that the damage results because the owners of such herds are not sufficiently careful to keep them within the traveled parts, hence the damage. If the owners of such herds restrained their animals so that they did not go beyond the traveled part, then it is at once apparent that no banks would be caved off or rocks rolled down the hill and consequently there would be no damage; therefore, when these animals go outside of the traveled parts, the owners are negligent and are guilty of a wrongful act in the sense that they are responsible for the damage that is done.

Counsel for appellant assert on page 7 of their brief, that if a man does a little damage by driving a half a dozen cows or sheep over the highway, a liability is imposed, but if heavy freight teams are driven over the same road no liability is imposed. This is not correct. It is only when the animals equal a herd that a liability is imposed. Again, although a man may drive ten herds over a highway constructed on a hillside, if such owner has sufficient help to restrain all these animals within the traveled part of the road, then no banks are caved off either above or below and no rocks are rolled down the incline into the highway and therefore there is no liability.

In the same way, the freight wagons that travel along the traveled part of the road incur no liability because they are confined to the traveled parts, hence, when restrained to the traveled parts, the law imposes no liability either on herds or on wagons; but there are certain herds that are not confined to the traveled parts; for instance, a band of sheep composed of several thousand head will travel partly in the traveled road, partly along the lower bank, and partly along the upper bank. So many of the animals walking in this way will roll the rocks from a considerable distance

down the hillside and keep them rolling until they pile them up in a ridge in the traveled part, the rocks finally stopping there because the surface is flat. In the same way the sheep below the road round off the bank on the lower side so that it becomes dangerous for wagons and teams. The damage thus done by these herds is done by no other class. One cow does no such damage; two horses do no such damage. Any number of freight wagons do not cave off the banks either above or below and do not roll a ridge of rocks down the hillside into the traveled parts.

The section under consideration should be constantly borne in mind that it imposes no liability for rolling *dirt* into the highway. It imposes no liability for damage done in traveling in the highway constructed on a hillside, but it imposes liability on herds of the animals mentioned for caving off banks, or rolling rocks into the highway as such damage is occasioned by *not* traveling in the highway.

POINT II.

The section in question is clearly withinin the general police power of Utah and therefore valid, even though it might otherwise be inhibited by Section 1 of the 14th Amendment of the Federal Constitution.

In other words even though this court were of the opinion that Section 2087 is in conflict with the 14th Amendment excluding consideration of the police powers, yet, if the court decides that the section is within the police power of the State, the law will be sustained.

In 129 U. S. 29, Minn. etc., Ry. Co. v. Beckwith, the court, by Justice Field, said:

> "But the clause does not limit, nor was it designed to limit the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations

for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end, special legislation must be resorted to in numerous cases providing against accidents, disease and danger, in the varied forms in which they may come."

And on page 33, the court, by Mr. Justice Field, said:

"From these adjudications it is evident that the Fourteenth Amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens."

In 113 U. S. 31, Barbier v. Connolly, the court, by Mr. Justice Field, said:

"The Fourteenth Amendment, in declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivations of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like curcumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

Mr. Sedgwick on Construct. of Stat. and Const. Law, at page 434-7 (2d Ed.) says:

"The clause prohibiting the taking of private property without compensation, is not intended as a limitation of the exercise of those powers which are necessary to the tranquility of

> every well ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given."

It is well settled then that when a question is within the police power of a state it is not within the prohibition of this clause of the Federal Constitution, because this clause was not designed to interfere with the police power. Appellant contends to the contrary, on the principle, that as the police power is within the *State Constitutions* therefore it is within the *Federal Constitution*; the police power of a state in many particulars is within the Federal Constitution if they conflict, but this is not true in every case.

As is stated in the above cases and quotations the police power includes regulations for the safety of society, the prevention of accidents and danger and the adoption of measures to advance the prosperity of the people.

It is for the safety of the people, the prevention of accidents and danger, and the prosperity of the people of Utah that persons should pay the damage done by driving herds of certain animals over public highways constructed on hillsides. These persons make a use of such highways not made by others, to-wit: in driving herds of animals which do not remain in the traveled part of the road. If these drivers led or drove such herds in the traveled way, then no liability is incurred, as the law is not applicable to such cases. The damage is done not so much by an unusual use, as by a non-use of such highway; not by traveling in the highway, but outside of it, by which the banks are caved off above and below and large quantities of rock rolled into the traveled parts.

In 2 Am. St. Rep. 305 (97 N. C. 477,) State vs. Yopp, a

statute was held constitutional which forbade the use of bicycles or non-horse vehicles on any road without the permission of the road superintendent.

On page 306 the court by Justice Merrimon said:

> "It is clear that the legislature has complete power to provide proper and reasonable police regulations, and to amend or alter them from time to time, in respect to the highways of the state, and persons going upon and over them with their vehicles, horses and other motive power, with a view to protect the roads, and the safety and comfort of passengers going over them."

And on page 308, said:

> "As we have said, it is the province of the legislature to decide upon the wisdom and expediency of such regulations and restraints, and the courts cannot declare them void or interfere with their operation, unless they are so manifestly unjust and unreasonable as to destroy the lawful use of property and hence are not within the proper exercise of the police power of the government."

In the above case not as much injury or inconvenience arose from the use of bicycles as arises in this state from the driving of the herds specified over the public highways constructed on hillsides.

The statute at bar cannot be condemned even if the court does not approve of its wisdom as on that point the legislature is the sole judge unless so unreasonable as to destroy the lawful use of property. But the statute at bar must appeal to all as not only a legitimate exercise of the legislative power, but also as eminently wise and proper, when all the conditions of this State are considered.

In speaking of the power of the legislature, in Munn v. Illinois, 94 U. S. 132-3, Mr. Chief Justice Waite said:

> "For our purpose we must assume that, if a state of facts could

exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void because in excess of the legislative power of the state But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

In the first opinion in this case in 11 Utah 207, Brim v. Jones, the Utah court said:

"It is easy to conceive that the business of drovers would be exceedingly injurious to highways situated upon a hillside, if their herds pass over the ground upon or near a highway in our mountain country, inasmuch as they would cause rocks and other obstructions to be thrown into the highway, and would break down the banks and otherwise specially injure highways. It was no doubt for this reason that the legislature required that those persons so engaged should be specially liable for all damage that they did to the highways."

And again on page 208-9, the court said:

"By this statute they simply say to the drover, who is possessed of property which if driven in a certain way, is calculated to destroy the highway, that he must so use his own property as not to destroy that of the public. There is no absolute liability for using the public highway, but it is deemed proper that a use in a particular way, of particular property, will produce particular injury, and to say if such injury is produced, then the person producing it is held liable. We cannot see that this unjustly discriminates against such person. On the contrary, it seems to be reasonable, fair, and just legislation as between all of the citizens. It must be held, if a case can be conceived that would justify the legislation, that that case existed when it passed, and it is certainly not difficult to conceive of the injury and wrong that it was intended to prevent by this statute."

From the authorities cited and a long line of other cases it is established beyond question that the public

highways are subject to the regulations that may be prescribed by the legislature or its delegated authority under the police power.

Elliott on Roads and Streets, pages 58-9.

In many of the cases cited under Point I, the business regulated was private in its nature, but the control of the highways of the state, which is the case here, is wholly and exclusively within the power of the state itself.

It is said in Elliott on Roads and Streets, page 6:

> "They [toll roads] are, of course, public in a limited sense, but not in such a sense as are the public ways under full control of the state, for public ways in the strict sense are completely under legislative control.
>
> * * * *
>
> "It must however, be true that over all ways in which there is a public right there must be some legislative authority. Presumptively all roads laid out under legislative enactments are public ways belonging to the state and under the full control of the legislature."

And in 2 Dill. Mun. Corp. it is said at Sec. 356:

> "The legislature of the state represents the public at large and has full and paramount authority over all public ways and public places."

And at Sec. 680:

> "As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets and the uses to which they may be put, depends entirely upon their charters or legislative enactments applicable to them."

In 115 U. S 661, New Orleans Gas Co. v. Louisana Light Co., the court said:

> "As thus defined, we may, not improperly, refer to that power [the police power] the authority of the State to create educational

> and charitable institutions, and to provide for the establishment, maintenance and control, of public highways, turnpike roads, canals, wharves, ferries and telegraph lines, and the draining of swamps."

If a license can be collected in advance in such cases as 43 Ill. 51, supra, then on principle the damage done by such persons could be collected afterwards; and if the damage done by heavy coal wagons can be collected as an exceptional damage, then the damage done by drivers of sheep on public highways constructed on a hillside can also be collected.

See generally:

17 Am. St. Rep. 696, (104 N. C. 714) State v. Moore.
109 Ill. 311, Hawthorn v. the People.
113 U. S. 703, Soon Hing v. Crowley.

Ordinances are held valid under the police power compelling abutting owners to sweep snow from the sidewalks in front of their premises:

16 Pick. 504, Nath. Goddard, Petitioner.
122 N. Y. 268, Village of Carthage vs. Frederick.

The above cases merit a careful reading, and in principle are far in advance of the one at bar; as there the abutting owners did not cause the snow to obstruct the walks, but here the appellant did cause the damage to the highway.

It is also well established that:

> "Police power can only be exercised by legislative enactment, and it rests solely within the legislative discretion to determine when public welfare or safety requires its exercise. Courts are authorized to interfere and declare a statute unconstitutional only when it conflicts with the constitution; with the wisdon, policy or necessity of such an enactment they have nothing to do."

18 Am. & Eng. Ency. Law, page 746, notes 2 and 3.